IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1466 OF 2005

Sheka Kada Gaikwad & Anr. .. Appellants.
(Orig.Plaintiffs)

Versus

Fakira Ravji Bansode & Ors. .. Respondents.
(Orig.Defendants)

Mr.P.M.Arjunwadkar for appellants.
Mr.Sanjay Thokade for respondent Nos.1A to 1E, 2, 4, 6 and 12 for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 26TH JULY, 2007.

P.C.:

1. Admit.

2. The substantial question of law that arises in this Second Appeal is as under :-

(a) When the lower Appellate Court has set aside the Judgement and Order of the Trial Court partially decreeing the suit, is it permissible for it to reverse it only on one issue of jurisdiction, more so, when it decides to frame an issue on merits of the suit also as one of the points for determination?

(b) In other words, the lower Appellate Court's omission in this case to consider all points framed for determination while reversing

the Judgement and Decree of the Trial Court is fatal or not?

3. By consent of Mr.Arjunwadkar and Mr.Thokade, the Second Appeal is taken up for hearing and final disposal forthwith. Mr.Thokade waives notice for respondent Nos.1A to 1E, 2, 4, 6 and 12.

4. Rest of the respondents have been served but they have not chosen to appear despite notice.

5. It is undisputed that the Appellants, who are the heirs and legal representatives of original plaintiff Kada Gaikwad, have filed Regular Civil Suit No.415 of 1989 in the Court of Civil Judge, Junior Division, Barshi against the 1st respondent original defendant for perpetual injunction and for recovery of the sum mentioned, more particularly, in the prayer clause.

6. The description of the suit property is in the plaint at paragraph 1.

7. It is the case of the plaintiffs that the suit properties which are allotted to "Mahar" community as Watandars are bearing old Survey Nos.99 and 100 and all of them are having rights of cultivation and raising income.

8. A consolidation scheme was prepared and the old survey numbers were replaced by new Gat numbers. The Mahar Watandars, whose names are recorded in the Record of Rights, consist of three branches and the plaintiff belongs to the branch of Appa Laxman.

9. The case of the plaintiffs is that, each branch has 1/6th share.

10. It is their further case that, out of branch of Appa Laxman, Daji and Rama were having 1/6th share each. Rama was having one son and the son had a daughter, who married one Gangaram Gaikwad.

11. The son of Rama transferred his 1/6th share in favour of his daughter by executing a Gift Deed dated 6th November, 1919. He transferred the properties, which are subject matter of the Gift Deed to her. Therefore, properties were under cultivation in the name of Dhondabai and her son (Kada). Lateron, Dhondabai transferred her right in favour of her son, who was taking the benefits of the suit property.

12. It is his case that he was cultivating the land but was obstructed by other shareholders. Subsequently, the son of Dhondabai died and the plaintiffs are the heirs of the said son (Kada).

13. It is their case that they were rendering services to the village and the plaintiffs were appointed as Kotwals. Although the plaintiffs were removed from the post of Kotwal, they were not ousted from 1/6th share of the suit land and they continuously used to take income from the suit land and they were jointly cultivating the lands upto 1988 alongwith the defendants without any obstruction. It is their case that on 26th May, 1989, the defendants did not allow the plaintiffs to take Jowar crop income and tried to prevent them from having benefit as per their share. It is in such circumstances, that the suit was filed. It is their case that the rights being in common, perpetual injunction should be granted restraining the defendants from obstructing the plaintiffs from taking their share and income from the suit properties.

14. Earlier, the suit was decreed as ex-parte but the ex-parte decree being challenged and set aside in appeal, a remand order was passed and the suit was re-heard. The Trial Court decreed the suit partly by restraining the defendants from causing any obstruction to the plaintiffs' joint possession over the suit properties.

15. The plaintiffs were satisfied with this decree but the defendants challenged the same in an appeal and the lower Appellate Court has allowed the appeal, set aside

the Judgement and Order of the Trial Court and dismissed the suit of the appellants original plaintiffs.

16. That is how the Second Appeal.

17. With the able assistance of the learned counsel appearing for both sides, I have perused the Judgement of the lower Appellate Court. The entire judgement frames two points for determination but only discusses the issues as to whether the provisions of Bombay Inferior Village Watans Abolition Act as well as the provisions of Bombay Hereditary Offices Act, 1874 need to be taken into consideration and it has to be found out whether there is any provision for alienation of Watandars property and the Rights. This is the only point, which has been addressed by the lower Appellate Court and a finding is rendered on the basis of the same that the Civil Court cannot decide the issue as to whether the alienation was legal, valid and it had no jurisdiction to do so. The Judgement of the Trial Court was reversed only on this point and there is no other discussion and reasoning in the entire judgement of the lower Appellate Court.

18. The Trial Court decree also has been perused by me and it appears that the issue of jurisdiction was framed therein as issue No.3 alongwith other issues. The main issue was with regard to the title and possession of the

plaintiffs over the suit property and the obstruction caused by the defendants to the cultivation thereof. Issue No.3 was regarding jurisdiction. The Trial Court has after holding that the suit is not brought for deciding any rights conferred by the aforesaid enactments but under the provisions of Specific Relief Act, concluded that the Civil Court is the appropriate forum.

19. The judgement of the lower Appellate Court, however, does not address itself nor it does consider these issues between the plaintiffs and defendants. Thus, whether the issue of alienation being valid or not is necessary to be decided for considering the Appellants' prayers in the suit is also not clear from the Appellate Court's judgement.

20. In my view and in the peculiar facts of this case, when the Trial Court was deciding the suit on all issues including jurisdiction, in Appeal, the learned Additional District Judge having two framed points for determination including jurisdiction, was obliged to decide them. He was also obliged to consider as to whether the suit is barred in the light of the provisions of the aforesaid enactments or that the legality and validity of the sale/alienation is in issue or not. If the same was not in issue, then, whether the Court below had jurisdiction to entertain and try the suit or not, are all matters

which arise for consideration alongwith the other issues.

21. In my view, the omission on the part of the 1st Appellate Court to consider all the points is fatal in this case and, therefore, its judgement cannot be sustained. Time and again, the Hon'ble Supreme Court has reminded the 1st Appellate Courts about their duties under Section 96 of the Code of Civil Procedure. The entire judgement and decree of the trial Court is before it. It is made clear that all questions of facts and law are open kept open for being agitated afresh. In such circumstances, cryptic judgements without indicating as to whether the other issues survive or not or the decision on jurisdiction is enough is not clear from the impugned judgement. Therefore, cannot be sustained.

22. The second appeal is, therefore, allowed. The decree and judgement of the 1st Appellate Court dated 16th January, 2005 in Reg.Civil Appeal No.321 of 2003 is set aside.

23. The only consequence of this would be that the Reg.Civil Appeal No.321 of 2003 is restored to the file of the District Court for being dealt with afresh on merits and in accordance with law.

24. Since, the judgement and decree of the lower

Appellate Court is rendered in the suit, which is filed in the year 1989, it would be in the fitness of the things when some of the parties are senior citizens as well, to expedite the hearing of the Reg.Civil Appeal and the District Court shall endeavour and dispose of the same as expeditiously as possible and within a period of six months from the date of first appearance of the parties before it. Parties to appear before the District Court on 3rd August, 2007 at 11.00 a.m.

25. It is clarified that I have not touched the rival contentions either on merits or on the issue of jurisdiction but rested my judgement only on the approach of the 1st Appellate Court and, therefore, the Court below while deciding the appeal afresh need not consider it bound by any observations made in the present judgement but shall decide the Regular Civil Appeal uninfluenced by the same on its own merits and in accordance with law. All contentions of both sides are expressly kept open. Mr.Arjunwadkar states that during the pendency of the civil appeal, the plaintiffs would not execute the decree of the trial Court.

26. Second Appeal allowed as above. No order as to costs.

(S.C.Dharmadhikari, J.)